



Timothy M. Hogan (004567)  
ARIZONA CENTER FOR LAW  
IN THE PUBLIC INTEREST  
202 E. McDowell Rd., Suite 153  
Phoenix, Arizona 85004  
(602) 258-8850

RECEIVED

2010 JUN 10 A 10:38

ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

Attorneys for Western Resource Advocates

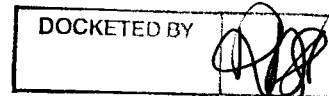
**BEFORE THE ARIZONA CORPORATION COMMISSION**

Arizona Corporation Commission

**DOCKETED**

JUN 10 2010

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP



IN THE MATTER OF THE APPLICATION  
OF SOLARCITY FOR A DETERMINATION  
THAT WHEN IT PROVIDES SOLAR  
SERVICE TO ARIZONA SCHOOLS,  
GOVERNMENTS, AND NON-PROFIT  
ENTITIES IT IS NOT ACTING AS A  
PUBLIC SERVICE CORPORATION  
PURSUANT TO ART. 15, SECTION 2 OF  
THE ARIZONA CONSTITUTION.

Docket No. E-20690A-09-0346

**WESTERN RESOURCE  
ADVOCATES' EXCEPTIONS TO  
RECOMMENDED OPINION AND  
ORDER**

**I. INTRODUCTION**

Western Resource Advocates ("WRA") appreciates the diligence and effort that went into the preparation of the recommended opinion and order by the Administrative Law Judge. However, WRA must respectfully disagree with the analysis and the result contained in the recommendation.

There are both legal and policy reasons why the Commission should reject the recommendation. From a legal standpoint, the recommendation reflects a mechanical and literal application of Article 15, Section 2 of the Arizona Constitution. At the risk of

1 oversimplification, the recommendation concludes that because a solar service agreement  
2 nominally provides for the sale of electricity, it means that “SolarCity is furnishing  
3 electricity and that it is a public service corporation.” Recommended Opinion and Order  
4 (“ROO”) at 25. That conclusion seriously shortchanges the Commission’s considerable  
5 authority to apply its judgment to the facts in this case. The mere sale of electricity does  
6 not automatically mean that the entity furnishing the electricity is a public service  
7 corporation. *See SW. Gas*, 169 Ariz. at 286, 818 P.2d at 721. (“Merely meeting the  
8 textual definition, however, does not establish an entity as a ‘public service  
9 corporation.’”). The Commission must use its judgment to determine whether the  
10 entity’s rates, charges and methods of operation are clothed with a public interest  
11 sufficient to subject it to “governmental control.” *Trico Elec. Coop., Inc. v. Corp.*  
12 *Comm’n*, 86 Ariz. 27, 34-35, 339 P.2d 1046, 1052 (1959). Those circumstances are  
13 simply not present in this case.

14 From a policy perspective, there is a tension between the Commission’s policy to  
15 promote distributed renewable energy through the Renewable Energy Standard and the  
16 proposed order. If regulation, whether “light” or otherwise, has the effect of discouraging  
17 solar service agreements or eliminating them altogether, then the cost for meeting the  
18 RES will increase because the options for consumers will have been reduced and the  
19 remaining options like ownership and leasing may be more expensive.

20 As more fully explained below, the Commission should apply its judgment to  
21 SolarCity and the solar service agreements and broadly determine that the public interest,  
22 including the Commission’s policy on renewable energy, does not compel “governmental  
23 control” of SolarCity’s provision of solar services agreements to schools, government and  
24 other non-profit organizations.  
25

1 **II. LEGAL ISSUES**

2 **A. The Proposed Order Reads the Constitution Too Narrowly**

3 Section 2 of Article 15 of the Arizona Constitution states:

4 All corporations other than municipal engaged in furnishing  
5 gas, oil, or electricity for light, fuel, or power; or in furnishing  
6 water for irrigation, fire protection, or other public purposes;  
7 or in furnishing, for profit, hot or cold air or steam for heating  
8 or cooling purposes; or engaged in collecting, transporting,  
9 treating, purifying and disposing of sewage through a system,  
10 for profit; or in transmitting messages or furnishing public  
11 telegraph or telephone service, and all corporations other than  
12 municipal, operating as common carriers, shall be deemed  
13 public service corporations.

14 The proposed order construes this provision literally and absolutely, finding that  
15 solar service agreements constitute furnishing electricity and requiring regulation of  
16 providers of these agreements as public service corporations. However, the courts have  
17 recognized that determining whether electricity is being furnished is more nuanced than a  
18 strict reading of Article 15, Section 2. In the *Southwest Transmission Cooperative* case,  
19 the court held that:

20 To be a "public service corporation," an entity's "business  
21 and activities must be such as to make its rates, charges and  
22 methods of operation, a matter of public concern, clothed  
23 with a public interest to the extent contemplated by law which  
24 subjects it to governmental control--its business must be of  
25 such a nature that competition might lead to abuse detrimental  
to the public interest." *Trico Elec. Coop., Inc. v. Corp.*  
*Comm'n*, 86 Ariz. 27, 34-35, 339 P.2d 1046, 1052 (1959)  
(citing *Gen. Alarm, Inc. v. Underdown*, 76 Ariz. 235, 262  
P.2d 671 (1953)).

26 The Commission has broad authority to regulate public  
27 service corporations in Arizona. See Ariz. Const. art. 15, § 3.  
28 The purposes of regulation are to preserve those services  
29 indispensable to the population and to ensure adequate  
30 service at fair rates where the disparity in bargaining power  
31 between the service provider and the utility ratepayer is such

1 that government intervention on behalf of the ratepayer is  
2 necessary. *Sw. Gas*, 169 Ariz. at 286, 818 P.2d at 721 (citing  
3 *Petrolane-Ariz. Gas Serv. v. Ariz. Corp. Comm'n*, 119 Ariz.  
4 257, 259, 580 P.2d 718, 720 (1978)). Competition is the  
5 general rule. *Gen. Alarm*, 76 Ariz. at 238, 262 P.2d at 672.  
6 However, when an entity dedicates private property to a use  
in which the public has an interest, it grants the public an  
interest in that use and must submit to regulation for the  
public good. *SWTC v. Arizona Corp. Com'n*, 142 P.3d 1240,  
1244-5 (App. 2006).

7 In *General Alarm v. Underdown*, the Court cautioned against an expansive reading of  
8 Article 15, Section 2:

9 It was never contemplated that the definition of public service  
10 corporations as defined by our constitution be so elastic as to  
11 fan out and include businesses in which the public might be  
12 incidentally interested .... It is only in the interest of the  
13 convenience and necessity of the public, of the nature and to  
the degree herein stated, that a business may be supervised  
and controlled, rates fixed or monopolies granted.

14 76 Ariz. 235, 239, 262 P.2d 671, 673 (1953).

15 Based on these authorities, there is simply not a compelling basis for the  
16 Commission's assertion of jurisdiction in this case. There is certainly no need for price  
17 regulation and none was alleged by any party to this case. SolarCity's activities, limited  
18 as they are in this case to non-profit entities, do not trigger the degree of public interest  
19 necessary for public service corporation status.

20 Although the recommended opinion and order asserts that an analysis of the *Serv-*  
21 *Yu* factors is unnecessary, it is the *Serv-Yu* factors that provide guidance in determining  
22 the depth of the public interest in regulating certain activities. In this case, an analysis of  
23 the relevant factors shows that the public's interest in regulation is minimal to non-  
24 existent.  
25

1           **1.     There is No Dedication of Private Property to Public Use**

2           The public does not use a photovoltaic system installed on a  
3           customer's property. A customer-sited solar energy facility  
4           serves only that customer and may only incidentally sell  
5           excess generation back to the utility (under rates and  
6           conditions regulated by the Commission).

7           **2.     There is No Public Interest in Customer-Sited Distributed**  
8           **Energy Projects**

9           A characteristic of a public service corporation is that its  
10          activities require governmental control of its rates, charges  
11          and methods of operation. There is a long history of public  
12          interest in the production and sale of electricity from central  
13          station generation resources and in the transmission and  
14          distribution of that electricity. However, there is little public  
15          interest when an individual customer obtains some of his or  
16          her electricity via a generation facility located at the  
17          customer's premises. The service affects only the customer  
18          on whose premises the distributed energy project is located.  
19          The service is provided for the benefit of the property owner,  
20          not for the general public. Thus, no governmental control of  
21          the price and method of operation is required.

22          **3.     Solar Service Agreements are Hedging Mechanisms and**  
23          **Environmentally Responsible Actions, and Do Not**  
24          **Provide Essential Services Requiring Commission**  
25          **Regulation**

            Regulation of public service corporations is intended to  
            preserve and promote those services which are indispensable

1 to large segments of the population. While furnishing  
2 electricity through a network of generators, transmission  
3 facilities, and distribution facilities may be regarded as an  
4 essential service, a grid-connected consumer does not have to  
5 obtain solar electric services provided by facilities located on-  
6 site in order to function and SolarCity's customers have  
7 functioned without solar service agreements in the past.  
8 Rather than seeking essential services, the customer is  
9 typically seeking a hedge against higher utility rates or  
10 seeking energy resources with little or no environmental  
11 impact.

#### 12 **4. There is No Monopoly Abuse**

13 A fundamental reason for regulating the sale of electricity to  
14 retail consumers is that the sellers have been considered to be  
15 "natural monopolies." A natural monopoly occurs when one  
16 firm can supply all the demand in a market at a price lower  
17 than two or more firms can. This situation can arise from  
18 economies of scale. In the case at hand, there are multiple  
19 companies marketing and supplying distributed generation  
20 from renewable energy resources. SolarCity is one such  
21 company. These companies operate in regional, national, or  
22 international markets and compete with each other. They are  
23 not in a position to monopolize the Arizona market in  
24 distributed generation or central station generation and there  
25 are no large barriers to entry into the market, except the threat

1 of rate regulation. Moreover, there is no evidence that  
2 competition might lead to abuse detrimental to the public  
3 interest that could be remedied by rate regulation.

4 **5. Customers Are Informed and Can Make Their Own**  
5 **Decisions About Solar Service Agreements**

6 One reason for regulation of public service corporations may  
7 be that consumers are uninformed and powerless to enforce  
8 contracts. In this instance, school district managers,  
9 government agencies, and other tax exempt entities are, in  
10 general, capable of comparing options for distributed energy  
11 resources as well as the many other inputs into their activities.  
12 The school district managers entering into the solar service  
13 agreements with SolarCity conducted their own analyses of  
14 the benefits of the solar service agreements. There is no  
15 reason to suppose that they need regulatory assistance in  
16 bargaining with competing suppliers of distributed energy  
17 facilities. Additionally, there is no reason to suppose that  
18 buyers of solar services have no recourse if the seller does not  
19 abide by the contract – they have the same legal and other  
20 avenues of recourse as if they purchased any other good or  
21 service not regulated by the Commission.

22 **6. There is No Obligation to Serve**

23 SolarCity is not obligated to serve all potential customers.  
24 For example, some consumers may not have sufficient space  
25 in which to install a solar energy system, or the site may  
receive little direct sunlight, or a building may not be

1 structurally suitable for a solar energy system, or the  
2 customer's credit may be unacceptable to SolarCity, and so  
3 forth. Moreover, a seller of solar energy services may  
4 choose, as a business decision, to market only to certain types  
5 of customers, such as high income residential customers,  
6 builders of new homes, customers in a particular industry,  
7 etc., and not to all potential customers.

8 **B. The Proposed Order Contemplates "Light" Regulation that Conflicts with**  
9 **the Phelps-Dodge Decision and Undermines the Need for Regulation as a**  
10 **Public Service Corporation**

11 The proposed order adopts the view that solar service agreements can be "lightly  
12 regulated" (pp. 67-68). But it does not explain how the Commission is to lightly regulate  
13 rates.

14 The *Phelps Dodge* decision requires the Commission to determine fair value and  
15 set a rate or range of rates taking fair value into consideration. *Phelps Dodge Corp. v.*  
16 *Arizona Electric Power Co-op Inc.*, 207 Ariz. 95, 83 P.3d 573 (App. 2004). In that case,  
17 the Court concluded that:

18 Even in a competitive market, Article 15, Section 14, of the  
19 Arizona Constitution requires the Commission to determine  
20 the fair value of Arizona property owned by a public service  
21 corporation and consider that determination in establishing  
22 just and reasonable rates. The Commission has broad  
23 discretion in determining the weight to be given the fair-value  
24 factor in any particular case, but may not simply ignore it. ...

25 The Commission is required by Article 15, Section 3, of the  
Arizona Constitution to set just and reasonable rates for  
electric services by considering the needs of all whose  
interests are involved, including public service corporations  
and the consuming public. Although the Commission may set  
a range of just and reasonable rates within which public  
service corporations can compete to provide services, ..., the



1 Commission cannot carry out its constitutional mandate by  
2 allowing competitive market forces to exclusively determine  
3 what is "just and reasonable."

4 Following the *Phelps Dodge* decision, the Commission would have to set a rate or  
5 range of rates for solar service agreements based on current, up-to-date determinations of  
6 fair value. Because the costs of distributed PV are declining rapidly and because the total  
7 investment in distributed PV may continue to grow rapidly (assuming such agreements  
8 continue to be offered in Arizona), fair value would have to be revised frequently.  
9 Frequent rate reviews run counter to the concept of "light regulation."

10 If, in contrast to the *Phelps Dodge* decision, the light-handed regulation  
11 anticipated by the proposed order would simply accept rates negotiated between buyer  
12 and seller and not involve any rate-setting by the Commission other than approval of a  
13 wide range of possible rates, the legal rationale for regulating Solar City as a public  
14 service corporation vanishes. If price regulation is not necessary, then it really does not  
15 matter what other reasons might exist for regulating SolarCity as a public service  
16 corporation. It is the need for price regulation that triggers the Commission's mandatory  
17 authority to denominate SolarCity a public service corporation and regulate its rates.

18 Finally, there are many other requirements imposed on public service corporations  
19 including compliance with the Commission's energy efficiency standard, the Renewable  
20 Energy Standard (which would require SolarCity to divide its solar service agreements  
21 between residential and non-residential applications), and, if the company has more than  
22 50 MW of distributed generation capacity, the integrated resource planning rule.  
23 Presumably SolarCity could request waivers from each of these and other applicable  
24 rules, but doing so is not costless nor can the Commission promise today that it will  
25 approve requests for waivers.

### 1    **III.    POLICY ISSUES**

2            There is a contradiction between: a) Commission policy to promote distributed  
3 renewable energy through the Renewable Energy Standard, and b) the proposed order.  
4 The proposed order (page 66) summarizes the argument that obtaining investors for solar  
5 service agreements would be hampered by regulation. Mr. Fox, testifying for SunPower,  
6 (Q&A 21-29), stated that regulation of Arizona solar service agreements would drive  
7 investors to look for projects in other states because of the financial uncertainty created  
8 by regulation.

9            However, the proposed order does not resolve the conflict between regulation of  
10 solar service agreements and the solar industry's belief that regulation would hinder or  
11 eliminate the use of solar service agreements by companies such as SolarCity. The issue  
12 is less the immediate effect of "light regulation" than the uncertainty about more strict  
13 rate regulation in the future. One possible outcome of the proposed order is that solar  
14 service agreements would no longer be offered in Arizona. Without an active  
15 competitive market in solar service agreements, costs for meeting the RES will increase  
16 because consumers desiring rooftop PV systems will have to choose from a smaller set of  
17 options -- primarily ownership and leasing -- which are more expensive for many  
18 consumers. Consequently, utilities will have to offer more lucrative incentives to meet  
19 RES requirements and the installation of distributed solar energy will slow down.

20            In sum, with the proposed order, the Commission is about to embark on an  
21 untested course to see whether Arizona can attract firms to offer a popular financing  
22 mechanism for distributed solar energy while imposing on those firms regulations that  
23 could deter investors. If this experiment fails, Arizona will be at a competitive  
24 disadvantage relative to states that do not regulate solar service agreements. If the  
25 Commission later determines that solar service agreements are important to expanding

distributed generation and that those agreements are rarely offered in Arizona because of regulation, it will be awkward to undo the findings in the proposed order.

#### IV. CONCLUSION

The Commission should modify the recommended opinion and order to conclude that SolarCity is not a public service corporation when it offers solar service agreements.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of June, 2010.

ARIZONA CENTER FOR LAW IN  
THE PUBLIC INTEREST

By 

Timothy M. Hogan  
202 E. McDowell Rd., Suite 153  
Phoenix, Arizona 85004  
Attorneys for Western Resource  
Advocates

ORIGINAL and 13 COPIES of  
the foregoing filed this 10<sup>th</sup> day  
of June, 2010, with:

Docketing Supervisor  
Docket Control  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, AZ 85007

COPIES of the foregoing  
electronically served this  
10<sup>th</sup> day of June, 2010 to:

All Parties of Record